Supreme Court, U.S.
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No. 01 -

IN THE SUPREME COURT OF THE UNITED STATES

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE
QUESTION PRESENTED

Whether the Sixth Amendment right to effective assistance of counsel requires a defense attorney to "unearth" and present "all relevant mitigating information . . . for consideration at the capital sentencing phase."

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IN THE SUPREME COURT OF THE UNITED STATES

No. 01 -

JEANNE WOODFORD, Warden, *Petitioner,*

v.

FERNANDO EROS CARO, *Respondent.*

Jeanne Woodford, Warden, California State Prison at San Quentin [hereafter the State], respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION OR JUDGMENT BELOW

The opinion of the Court of Appeals, App. A at 1-21, is reported at 280 F.3d 1247 (9th Cir. 2002). The order of the District Court granting habeas corpus relief from respondent Caro's death sentence, App. B at 22-39, is unreported.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals granting habeas corpus relief was entered on February 19, 2002. The jurisdiction of this Court is timely invoked under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISION

The Sixth Amendment to the United States Constitution provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On the evening of August 20, 1980, respondent Fernando Caro [hereafter Caro] shot 15-year-old Mark Hatcher in the face as Mark and Mary Booher, his 15-year-old cousin, rode their bicycles in an orchard near Mark's home in rural Fresno County, California. Caro then fled in a pickup truck with Mary and the bicycles. Mary's body was found a few miles away in an orange grove on August 25. She had been shot in the head. The bicycles were abandoned in an irrigation canal.

While fleeing with Mary after killing Mark, Caro struck another car but failed to stop. The owner of the car and his friend gave chase and Caro eventually pulled over. After allowing the men to approach as he begged them not to hurt him, Caro suddenly displayed his gun and shot the men. Both survived, but one was left functionally blind in one eye.

Caro subsequently hid his truck and altered his facial appearance. The weapon used in the crimes belonged to his girlfriend.

Caro was represented at trial by the Fresno County Public Defender's Office.[1/] Counsel had Caro examined by at least four mental health experts. No expert found evidence of organic brain defect or suggested that further tests be conducted. EEG

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1. The case was tried in Santa Clara County on a change of venue.

examinations of Caro were normal. One expert observed that Caro's mental processes were efficient and effectively manifested and later testified that Caro was highly motivated and cooperative during the psychological testing. Caro's intellectual ability was significantly above average.

Counsel also submitted blood samples drawn from Caro when he was arrested to a laboratory, requesting that they be tested for the presence of various pesticides manufactured at a plant where Caro was employed at the time of the murders and his arrest five days later. The test results were negative for any of the substances.

At trial Caro's guilt defense consisted primarily of exposing discrepancies in the prosecution's case and attacking the sufficiency of the evidence on various counts.[2/] The jury convicted Caro of two counts of first degree murder, kidnapping, and two counts of assault with intent to commit murder. They also found true a multiple murder special circumstance, thus making Caro eligible for the death penalty.

The penalty phase of Caro's trial was heard, at his request, by a separate jury. In addition to the guilt phase testimony, the prosecution presented evidence of two prior uncharged murders,[3/] a prior kidnapping conviction stemming from a

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2. Counsel decided not to raise any guilt phase mental defense after one of the experts who had been retained specifically to assist with the guilt phase found, based on his interviews with Caro, no mental disorders that could establish a defense.

3. The jury was instructed that it must unanimously find beyond a reasonable doubt that Caro had committed the uncharged murders before the evidence could be considered as aggravation. In their verdict forms the jurors reported that they did not unanimously find Caro guilty of either murder and presumably followed the instruction not to consider those crimes in determining the appropriate penalty. The California

forcible kidnap and rape, and two attempts to escape from jail. The prior rape victim testified in the penalty phase.

Caro "introduced extensive background and character evidence" in mitigation. *People v. Caro*, 46 Cal.3d 1035, 1052, 251 Cal.Rptr. 757, 767, 761 P.2d 680, 690 (1988). Among the 17 witnesses called by defense counsel were Caro's parents, a brother, childhood and other friends, his high school coach, his ex-wife, his girlfriend, a job supervisor, and a vocational instructor from the state prison where Caro was incarcerated on the earlier kidnapping conviction. The defense also introduced a detailed history of Caro's life through a licensed clinical social worker and testimony from a clinical psychologist who had interviewed and tested Caro. The jury returned a sentence of death. Judgment was pronounced on January 5, 1982.

Caro's convictions and death sentence were affirmed by the California Supreme Court, which also considered two petitions for state habeas corpus relief. In his second state petition, filed in June 1992, Caro presented declarations from new experts who concluded, in part, that he might suffer from organic brain damage which might be tied to exposure to neurotoxic pesticides. The conclusions were based on examinations of Caro made ten to twelve years after the murders and without any expert expressly documenting an organic brain defect. These experts did not undertake to explain the relationship, if any, between such toxic exposure and the kidnapping, murders, and attempted murders for which Caro was convicted. Indeed, conspicuous by its absence was any reference in the expert declarations to Caro's crimes. Caro alleged that trial counsel was ineffective for failing to uncover and present evidence pertaining to neurotoxin exposure as mitigation. The claims

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Supreme Court observed that the unanimity instruction was not required by state law, thus providing Caro greater protection in the penalty phase than that to which he was entitled. *People v. Caro*, 46 Cal.3d 1035, 1057, 251 Cal.Rptr. 757, 771, 761 P.2d 680, 693 (1988).

were denied on the merits by the state supreme court without an evidentiary hearing in September 1993.

Caro then filed a federal habeas corpus petition in November 1993, again alleging *inter alia*, trial counsel was ineffective for not discovering and presenting as mitigation evidence that he allegedly suffered brain damage from neurotoxin exposure. The District Court denied an evidentiary hearing, granted the State's motion for summary judgment, and denied the petition.

On appeal the Ninth Circuit unanimously denied several claims relating to the guilt determination but held, in a 2-1 decision, that Caro was entitled to an evidentiary hearing on his assertion of ineffective assistance of counsel at the penalty phase. *Caro v. Calderon*, 165 F.3d 1223 (9th Cir.), *cert. denied* 527 U.S. 1049 (1999) [*Caro I*]; App. C at 40-63. Finding that trial counsel failed to consult the correct experts and thus failed to present "every piece of relevant evidence in mitigation," 165 F.3d at 1228; App. C at 48, the majority remanded to the district court for an evidentiary hearing "to determine whether [Caro] suffered brain damage as a result of his exposure to neurotoxicants and his personal background. If so, counsel's failure to investigate will have rendered the results of Caro's penalty phase trial unreliable." *Id.*; App. C at 50.

The evidentiary hearing consisted of videotape testimony from three experts. Dr. Pincus, a neurologist, concluded that Caro had frontal lobe damage when the doctor examined him and presumed he suffered from such damage 20 years earlier when Caro committed the murders. Experts failed to uncover such damage at the time of trial because they used the wrong tests. Dr. Pincus did concede that he had no expertise in the effects of neurotoxin exposure and could not say whether pesticides could have caused any brain deficiencies.

Dr. Bear, a neuropsychiatrist, agreed that Caro had frontal lobe brain damage, which he attributed in part to pesticide exposure and head injury. The doctor admitted there was no agreement on what part of the brain is damaged by various

pesticides, no evidence such exposure can cause frontal lobe damage, and no agreement on how much exposure to neurotoxins can lead to aggressive behavior. While dismissing the absence of brain damage in the reports of trial experts, Dr. Bear did concede that attributing homicidal behavior to pesticide exposure was not "common currency" in 1980.

A toxicologist, Dr. Ecobichon, never met Caro and could say only from a review of records that Caro was exposed to various neurotoxic substances which had the potential to cause damage. He testified, as did Dr. Bear, that reports suggesting some link between pesticide exposure and aggressive behavior were entirely anecdotal in 1981. The doctor also acknowledged that Caro did not exhibit any neurological problems from childhood through high school, nor did it appear he suffered academic or athletic deficits of the type that might be expected from some forms of pesticide poisoning.

The State did not present its own experts but demonstrated through cross-examination and exhibits that Caro had an above average IQ, had done well academically, and was an athlete in high school. Caro attended college, became a Marine officer, and qualified for training as a helicopter pilot. Tests conducted while he was in prison on the kidnapping conviction demonstrated that Caro had no organic brain damage. Until the tests conducted many years after trial no mental health expert had found evidence of a brain defect. The State also presented evidence of negative results from the blood tests for pesticides requested by trial counsel.[4/] The blood testing evidence had not been available to the district court or the Ninth Circuit in the

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4. In a declaration filed during the initial district court proceedings Dr. Ecobichon noted that blood samples indicated Caro had been exposed to a fungicide, an assertion found significant by the Ninth Circuit majority. App. A at 13. The court ignored, however, Dr. Ecobichon's subsequent testimony that fungicides have little toxicity.

earlier proceedings.[5]

The district court concluded that it was "not empowered to conduct a Strickland analysis based on the evidence adduced at the hearing. Rather, the Ninth Circuit applied such an analysis and concluded that the attorney's performance was deficient, if, in fact, there is evidence that [Caro] suffered brain damage as a result of his exposure to toxic chemicals and his personal background." App. B at 38. The court then determined that Caro had suffered brain damage and granted relief from the death sentence pursuant to its understanding of the circuit court mandate. App. B at 38-39. It did not evaluate trial counsel's performance in light of the newly disclosed blood testing evidence.

On the State's appeal the Ninth Circuit, again by a 2-1 vote, affirmed the order granting relief. Citing its own prior decisions in this and other capital cases the court held that trial counsel had "an affirmative duty to provide mental health experts with information needed to develop an accurate profile of defendant's mental health." *Caro v. Woodford*, 280 F.3d 1247 (9th Cir. 2002) [*Caro II*]; App. A at 11. By not informing the trial experts about Caro's exposure to pesticides and toxic chemicals, and by not selecting the correct experts, counsel's performance was deficient. App. A at 12. Although counsel did have Caro's blood tested they should have known the negative results "would not have told the whole story" and were still obligated to ask the correct questions about Caro's history

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5. In addition, the evidentiary hearing record established that at the time of Caro's trial a defense based on exposure to pesticides had not been presented in any criminal case. Since then, only one defendant had attempted, albeit unsuccessfully, to mount such a defense. *See Commonwealth v. Garabedian*, 399 Mass. 304, 503 N.E.2d 1290 (1987) (defendant convicted of first degree murder and sentenced to life without possibility of parole despite mental defense premised on exposure to pesticides supported in part by testimony of Dr. Bear).

of exposure to pesticides to the proper expert. App. A at 13. In addition counsel was obligated to present expert testimony explaining the impact of child abuse on Caro's brain. App. A at 12. The majority concluded that "'all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase.'" App. A at 13, brackets in original. Trial counsel's failure to "'"present[] and explain[] the significance of all the available [mitigating] evidence,"'" App. A at 10, brackets in original, resulted in a constitutionally deficient penalty phase investigation. App. A at 14-15.

Turning to prejudice the majority determined that it was "incumbent" upon them to declare the brain damage found by the district court "relevant mitigating information" which "should have been explained to and considered by the sentencing jury." Because trial counsel did not present that testimony its omission "renders Caro's death sentence unreliable." App. A at 16. The majority was not dissuaded from its conclusion by the strength of the aggravating evidence, App. A at 16, and criticized the trial mitigation as consisting "primarily of lay background and character evidence." The expert testimony at trial was insufficient because it "did not shed light on [Caro's] brain damage" and "did not reduce his moral culpability for his own lack of control over his emotions." App. A at 16-17. The failure to provide the jury with expert testimony "explaining the effects that Caro's *physiological* defects would have on his behavior" was prejudicial. App. A at 17, emphasis in original. Because the majority believed Caro's "mental defect might have caused him to suddenly lash out uncontrollably" the night he murdered the teenage cousins and attempted to kill two other people, it held the penalty verdict unreliable. App. A at 18.

The dissenting judge found the majority "was trying the case, instead of the jury that heard it twenty years ago." App. A at 19. In light of the efforts counsel did take to investigate mitigation, the lack of information other than anecdotal dealing with the effects of pesticide exposure on the brain, and the

inconsistency of the new opinion evidence about brain damage with Caro's actual history and behavior, the majority's conclusion violated this Court's precedents with respect to claims of ineffective counsel. App. A at 20. Although the majority's holding "purported to be that Caro's lawyer rendered ineffective assistance of counsel, it is more consistent with the proposition that if anyone can come up with anything that might have bolstered whatever case the defense had, during the decades following imposition of a death penalty, then the defendant is entitled to a new penalty trial." App. A at 21.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment right to counsel in criminal cases "is the right to effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771, n. 14 (1970). A state prisoner claiming violation of this right must prove both that his attorney's performance was deficient and that counsel's actions were prejudicial. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "It is past question," *Williams v. Taylor*, 529 U.S. 362, 391 (2000), that *Strickland* sets forth the rules by which any claim of ineffective assistance by trial counsel must be judged. It is equally clear the same standards apply to both the guilt and penalty phases of a capital trial. *Strickland*, 466 U.S. at 686-687 ("For purposes of describing counsel's duties, therefore, Florida's capital sentencing proceeding need not be distinguished from an ordinary trial.").[6/] "As a general matter, a defendant alleging a Sixth Amendment violation must

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6. As in Florida the penalty phase of a California capital trial is heard by a jury which renders a verdict on the appropriate sentence. But the California jury verdict is not, as in Florida, a mere recommendation; the California penalty jury is the sentencing authority within the meaning of the Eighth Amendment.

demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Mickens v. Taylor*, 122 S.Ct. 1237, 1240 (2002), slip op. at 3, *citing Strickland*.

As explained in *Mickens*, 122 S.Ct. at 1241; slip op. at 3-4, the Court has established limited exceptions to the requirement of an "individual inquiry into whether counsel's inadequate performance undermined the reliability of the verdict." One may arise where trial counsel actively represented conflicting interests, *id.*, a circumstance not at issue in this case. Otherwise a defendant may be entitled to a presumption of prejudicial effect "where counsel has been denied entirely or during a critical stage of the proceeding." *Id.* at 1241; slip op. at 3. The Court explained in *United States v. Cronic*, 466 U.S. 648, 659 (1984), that other than a complete absence of counsel a denial of the Sixth Amendment right may occur "if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . ." The Court recently heard argument on the extent to which, if at all, counsel's actions in the penalty phase of a capital case can result in a constructive denial of representation, thus eliminating the need to demonstrate prejudice. *Bell v. Cone*, No. 01-400, *cert. granted* 122 S.Ct. 663, 151 L.Ed.2d 578 (2001) (argued March 25, 2002). This case presents issues similar to those underlying the Court's grant of certiorari in *Cone*, although the Ninth Circuit has gone further than did the Sixth Circuit by establishing an explicit rule applicable to all cases.

The Ninth Circuit granted habeas corpus relief from Caro's death sentence based on its determination that the posttrial opinions of experts demonstrated an inadequate investigation by trial counsel, because the attorneys had not consulted the right experts or provided the experts they did consult unsolicited information deemed significant by the new experts and the circuit court. App. A at 11-12; *see also Caro I*, 165 F.3d at 1226-1227; App. C at 45-46. Prejudice was deemed to have resulted because the jury "was not afforded the benefit" of the

newly developed expert testimony. App. A at 17.

The effect, as explained by Judge Kleinfeld's dissent, is to require reversal of a death sentence whenever any new or additional information is uncovered after the trial. App. A at 21. Specifically, the Ninth Circuit has established explicit, mandatory, penalty phase investigation responsibilities to "unearth" all potential mitigating evidence; trial counsel must satisfy this duty or be found deficient per se. The Ninth Circuit has further established what is in effect a per se rule of prejudice whenever potential mitigating evidence is uncovered after trial.[7] By eviscerating the *Strickland* standard the circuit court created new rules in violation of *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit has thus established both performance and prejudice tests that are fundamentally at odds with *Strickland* and yet will govern all future Ninth Circuit capital cases unless this Court grants certiorari.[8]

A. Trial Counsel's Duties

Because a "wide range of reasonable professional conduct" will satisfy the *Strickland* standard, 466 U.S. at 689, the Court

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7. In an opinion filed one month after *Caro* Judge Kleinfeld expressly observed that the court had created a per se rule of reversal whenever trial counsel had not introduced specific, newly developed evidence at the penalty phase. *See Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002) (Kleinfeld, J., dissenting).

8. Not surprisingly, over a six-week period from February 1, 2002, to March 18, 2002, the Ninth Circuit reversed the death sentence in two other California cases for ineffective assistance of counsel, *see Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002); *Karis v. Calderon*, 283 F.3d 1117 (9th Cir. 2002), and remanded a fourth for an evidentiary hearing on such a claim. *Turner v. Calderon*, 281 F.3d 851 (9th Cir. 2002).

has "consistently declined to impose mechanical rules on counsel . . . ." *Roe v. Flores-Ortega*, 528 U.S. 470, 481 (2000). The relevant question is whether trial counsel's decisions were reasonable. *Id.*

In *Caro I* the circuit court concluded that trial counsel in a capital case have a duty to consult specific experts in preparation for the penalty phase. Despite having hired four mental health experts, trial counsel were deemed deficient because none of the experts were neurologists or toxicologists. 165 F.3d at 1226; App. C at 45-46. The court based this holding on the fact federal habeas counsel had later found experts who were willing to opine that Caro suffered brain damage from exposure to toxic pesticides. The court necessarily assumed that trial counsel must have been deficient in not uncovering the same opinions nearly 20 years earlier. The decision completely shifted the focus from the reasonableness of what counsel actually did at the time of trial to what they allegedly should have done based on theories and evidence developed many years later.

The district court, in its order following the evidentiary hearing, clearly understood that the circuit court had created a presumption of deficient performance based solely on Caro's ability to develop any new potential mitigation. Although faced with evidence that trial counsel had, in fact, been aware of Caro's exposure to pesticides and had explored the issue by having his blood tested for residue from pesticides manufactured at the plant where Caro was employed,[9] the

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9. Caro was arrested five days after the murders and the blood samples were drawn from him at that time. The blood test results were not provided to the State until after the remand for an evidentiary hearing in *Caro I*; they were not in the record before the district court when it originally denied relief or before the Ninth Circuit when it issued its first opinion. Declarations of trial counsel prepared by Caro for the habeas corpus proceedings did not mention the blood samples, let alone

district court declared that it was "not empowered to conduct a Strickland analysis based on the evidence adduced at the hearing. Rather, the Ninth Circuit applied such an analysis and concluded that the attorney's performance was deficient, if, in fact, there is evidence that [Caro] suffered brain damage as a result of his exposure to toxic chemicals and his personal background." App. B at 38. This approach—one based not on what was done but solely on what was developed later—is utterly unfaithful to the reasonableness standard mandated by this Court.

On appeal the Ninth Circuit did nothing to discredit the district court's analysis or conclusion. Rather, it asserted that "'all relevant mitigating information [must] be unearthed for consideration at the capital sentencing phase.'" App. A at 15, bracket in original, *citing Caro I*.[10/] This remarkable departure

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identify counsel's reasons for having them tested or reveal the contents of any discussion about the results with defense experts. By the time the results had been made available to respondent the decision in *Caro I* had already foreclosed any discovery or testimony from counsel on those issues by limiting the remand to whether Caro in fact suffered brain damage, the circuit court having already decided that counsel's investigation was deficient.

10. The court actually misquoted its earlier opinion. In *Caro I* the circuit court explained it is "imperative" that relevant mitigation be uncovered. 165 F.3d at 1227; App. C at 46. With elimination of "imperative" and inclusion of the bracketed "must" the court subtly modified an observation about the importance of penalty phase investigation into a mandatory duty which was violated by the subsequent development of additional mitigation. Its conversion of "a suggestion into a straightjacket" is wholly inconsistent with this Court's standards for evaluating counsel claims. *Smith v. Robbins*, 528 U.S. 259, 273 (2000).

from the reasonableness standard of *Strickland* cannot be dismissed as a careless peripheral reference in the majority opinion. Rather, the court characterized the newly-announced duty to "unearth" all available mitigating evidence as a holding, App. A at 15, thereby binding future Ninth Circuit panels which might be confronted with similar issues. *See, e.g., Branch v. Tunnell*, 14 F.3d 449, 456 (9th Cir. 1994).

The court dismissed the blood testing as inadequate because a "reasonably competent attorney would have known that a blood test would not have told the whole story . . . ." App. A at 13. The only trial investigation deemed adequate was one that would have uncovered the same evidence disclosed by any subsequent investigation. In the Ninth Circuit's view, the multiple mental health experts consulted by counsel and numerous lay witnesses interviewed did not satisfy the performance prong of *Strickland* because, as the dissenting judge explained, habeas counsel were able to find more.[11/]

The requirement that trial counsel must find "all" mitigation to avoid being held deficient, as well as the "affirmative duty" to provide information to mental health

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11. The requirement that trial counsel must consult multiple mental health experts in order to locate the "right one" is not only at odds with this Court's *Strickland* standards, it arguably imposes a duty on state courts inconsistent with *Ake v. Oklahoma*, 470 U.S. 68 (1985) as well. While *Ake* granted indigent defendants access to a psychiatric expert, it did not guarantee an expert of the defendant's choice or a particular substantive result. *See, e.g., Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir.), *cert. denied* 525 U.S. 1012 (1998). Given the Ninth Circuit decision in this case, a state trial court which denies a defendant's request for funds to hire multiple experts runs the risk of creating ineffective assistance by failing to provide counsel with the "right" expert. We emphasize that in this case Caro's counsel hired *four* mental health experts, all at public expense.

experts whether requested or not, place upon trial counsel explicit duties which are inconsistent with this Court's refusal to establish "bright-line" rules of performance. *Roe v. Flores-Ortega*, 528 U.S. at 480.[12]

Moreover, as is made clear in *Caro I*, 165 F.3d at 1226-1227; App. C at 44 - 46, the Ninth Circuit applies different performance standards to counsel in the guilt as opposed to the penalty phase of a trial and did so in this case. *See also Silva v. Woodford*, 279 F.3d 825, 843 (9th Cir. 2002); *Wallace v. Stewart*, 184 F.3d 1112, 1116-1117 (9th Cir. 1999), *cert. denied* 528 U.S. 1105 (2000).[13] As noted above this Court determined in *Strickland* that the same test applies to claims of ineffective assistance in both the guilt and penalty phases of a capital case. The higher performance standard and per se deficiency rule imposed in this case by the Ninth Circuit are indefensible under this Court's precedent and violates *Teague*.

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12. The imposition of these added burdens on trial counsel is also inconsistent with the prevailing understanding of *Strickland*'s teaching. *See, e.g., Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir.), *cert. denied* 506 U.S. 958 (1992) (counsel is not obligated to "shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders"); *Sidebottom v. Delo*, 46 F.3d 744, 754 (8th Cir.), *cert. denied* 516 U.S. 849 (1995) (same); *Card v. Dugger*, 911 F.2d 1494, 1512 (11th Cir. 1990) (counsel is not obligated to track down every record that might affect expert diagnosis).

13. In a recent non-capital memorandum decision the Ninth Circuit expressly stated that its rejection of ineffective assistance of counsel claims "would probably be different" if the same claims related to the penalty phase of a capital trial. *Easley v. Clarke*, No. 00-16205 (9th Cir. February 21, 2002).

B. Requirement of Prejudice

The *"Strickland* test 'of necessity requires a case-by-case examination of the evidence.'" *Williams v. Taylor*, 519 U.S. at 391. Reversal is justified only if the petitioner carries his burden of proving there is a "reasonable probability" the sentencer "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The Court explained in *Williams* that when assessing the prejudice component of *Strickland* a court must "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in reweighing it against the evidence in aggravation." *Id.* at 397-398. The Ninth Circuit acknowledged *Williams*, App. A at 15, but then applied its own per se reversal standard.

Noting Caro's personal background and the district court's finding that he had suffered brain damage from exposure to pesticides, the circuit court held it "incumbent" upon them "to find that this fact was relevant mitigating information and should have been explained to and considered by the sentencing jury. The omission of this evidence renders Caro's death sentence unreliable." App. A at 16. The mitigation from trial was dismissed on the ground that it "consisted primarily of lay background and character evidence," while the expert testimony presented by defense counsel was deemed to "shed [no] light on [Caro's] brain damage." App. A at 16 - 17. Because the jury did not have the "benefit of expert testimony" on the newly developed theory of brain damage and it possible effects on his behavior, Caro was denied effective assistance of counsel. App. A at 17 - 18.

In reaching this conclusion the court refused to analyze the evidence in aggravation. That evidence included Caro's purposeful stalking of his young victims, his behavior luring the assault victims into a false sense of security before shooting them, his attempts to conceal his truck and alter his appearance

after the murders, his prior kidnapping and rape of a young woman, and his multiple escape attempts. As noted, the court also gave no consideration to the 17 mitigation witnesses presented to the penalty jury. The trial evidence detailed Caro's difficult life history, including admissions from his parents that he was beaten as a child, despite which he had done well in school, attended college, and qualified as a Marine officer and pilot. The court also disregarded testimony from the new experts admitting the ways in which Caro's history and behavior failed to demonstrate that he was unable to control his behavior.

The Ninth Circuit concluded that irrespective of what the jury actually heard, absent the new expert evidence the penalty determination was not reliable. The circuit court thus supplanted the reasonable probability test set forth in *Strickland* and the Court's subsequent counsel cases with a new rule of per se reversal whenever additional mitigation is developed in collateral proceedings.

Given the relative ease with which habeas corpus counsel are able to create some new evidence, the Ninth Circuit rule makes reversal of the death sentence for ineffective assistance of counsel a virtual certainty in every case. The decision's inconsistency with this Court's precedent and conflict with other circuits warrant further review.

CONCLUSION

For the above reasons certiorari should be granted.

Dated: April 15, 2002

Respectfully submitted,

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